

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

JOANNE ENRIQUE,)
) C.A. No. 08C-07-026
 Plaintiff,)
)
 v.)
)
 STATE FARM MUTUAL AUTO-)
 MOBILE INSURANCE COMPANY,)
 a foreign corporation,)
)
 Defendant.)

Submitted: March 15, 2010

Decided: June 30, 2010

William D. Fletcher, Jr., Esq., Schmittinger & Rodriguez, Dover, Delaware.
Attorney for Plaintiff.

Colin M. Shalk, Esq., Casarino, Christman, Shalk, Ransom & Doss, Wilmington,
Delaware. Attorney for Defendant.

*Upon Consideration of Plaintiff's
Motion For Costs & Prejudgment Interest*
GRANTED

VAUGHN, President Judge

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ORDER

Upon consideration of the plaintiff's motion for costs and prejudgment interest, the defendant's partial opposition thereto, and the record of this case, it appears that:

1. The plaintiff, Joanne Enrique, seeks an award of costs and prejudgment interest after having successfully obtained a jury verdict against the defendant, State Farm Mutual Insurance Company.¹ The jury verdict was in the amount of \$265,000. The claim was an under-insured motorist claim. The policy limits were \$100,000 and the plaintiff had been given a \$25,000 advancement. Consequently, the actual amount of her judgment is \$75,000.² The plaintiff seeks the following award:

- | | |
|---|------------|
| (a) Court Filing Fees: | \$ 682 |
| (b) Sheriff Service Fee: | \$ 30 |
| (c) Insurance Commissioner Service Fee: | \$ 25 |
| (d) Dr. Glenn Rowe, M.D.
(Medical Expert Witness Fee for Trial Deposition) | \$ 3,000 |
| (e) Cornerstone Media Productions
(Video Recording of Dr. Rowe Deposition) | \$ 632 |
| (f) Prejudgment Interest
(At rate of 9.75%) | \$ 101,192 |

¹ The Court is aware that the defendant has appealed this case, however, the Court maintains jurisdiction to decide a motion to award costs. *Emerald Partners v. Berlin*, 811 A.2d 788, 791 (Del. 2001) (“We also hold that an appeal from the final judgment on the merits does not divest the trial court of jurisdiction to decide the motion to award costs. Any decisions by [the Delaware Supreme Court] to the contrary are overruled.”).

² See Pre-Trial Stip. 2(e), (f).

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2. The prevailing party in a civil action is entitled to be awarded court costs,³ which often includes expert witness fees.⁴ Generally speaking, the decision to award costs is left to the discretion of the trial court.⁵ Additionally, in certain circumstances, that same party is entitled to an award of prejudgment interest.⁶

3. The defendant, for the most part, is in agreement with the plaintiff about what costs the plaintiff is due. The defendant does not contest the awarding of the costs described above as (a), (b), (c), and (e). The Court, therefore, awards the plaintiff her requested amount: \$1369.

4. The defendant does, however, take issue with the requested awards described above as (d) Dr. Rowe's deposition, and (f) prejudgment interest. In particular, the defendant contends that the requested award for Dr. Rowe's deposition is too high, and that the request for prejudgment interest is either inappropriate in this case or is too high.

5. "The fees for witnesses testifying as experts . . . shall be fixed by the court in its discretion, and such fees so fixed shall be taxed as part of the costs in each case and shall be collected and paid as other witness fees are now collected and

³ 10 *Del. C.* § 5101; Super. Ct. Civ. R. 54(d).

⁴ 10 *Del. C.* § 8906.

⁵ *Donovan v. Delaware Water & Air Resources Comm'n*, 358 A.2d 717, 722-723 (Del. 1976).

⁶ 6 *Del. C.* § 2301.

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paid.”⁷ While an award of fees for expert testimony is usually intended to cover the costs related to in-court trial testimony, it may also be used to cover the costs of deposition testimony that is utilized at trial.⁸ Expert witness fees should be limited to the time spent testifying.⁹

6. The plaintiff has requested \$3,000 in expert witness fees. The defendant contends that amount is excessive, and instead suggests a fee of \$1,400. When determining the appropriate amount of fees to award medical experts, the Court frequently utilizes the advice of the Medico-Legal Affairs Committee of the Medical Society of Delaware.¹⁰ The Committee’s 2006 recommendations state that an appropriate fee range for a deposition lasting up to two hours is \$1000 - \$2000.¹¹ After adjusting for inflation,¹² current reasonable fees for a deposition lasting up to two hours is \$1160 - \$2320.¹³ With those guidelines in mind, I award \$2000 for the

⁷ 10 *Del. C.* § 8906.

⁸ *Summerhill v. Iannarella*, 2009 WL 891048, at *1 (Del. Super.).

⁹ *See Miles, Inc. v. Cookson America, Inc.*, 1995 WL 214397, at *1 (Del. Supr.).

¹⁰ *Bond v. Yi*, 2006 WL 2329364, at *3 (Del. Super.) (collecting cases).

¹¹ Medico-Legal Affairs Committee, *Recommended Guidelines for Medical Expert Fees* (March 2006). While the plaintiff’s opening motion for costs did not state how long Dr. Rowe’s deposition lasted, one of the attached exhibits stated that the deposition lasted one hour and forty five minutes. Pl. Mot., Ex. C (Memorandum from Dr. Rowe’s office to the plaintiff’s attorney requesting payment of fees).

¹² *See Parker v. Parker*, 2009 WL 3338098, at * 2 (Del. Super.).

¹³ There has been an increase in the consumer price index (“CPI”) from March 2006 to March 2010 of 16%. *Compare* Bureau of Labor Statistics, U.S. Dep’t of Labor,

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expert fee.

7. The plaintiff has requested \$101,192 in prejudgment interest, calculated as 9.75% interest of \$235,000, the jury award minus the \$25,000 advance. The defendant has raised two separate arguments regarding the plaintiff's request. First, it contends that the plaintiff is not entitled to prejudgment interest because its liability cannot exceed the policy limit of \$100,000. Second, assuming the plaintiff is entitled to prejudgment interest, the defendant contends that interest should be calculated upon only the amount she is receiving, \$75,000, not \$235,000.

8. If a plaintiff wins a tort action for compensatory damages in this Court, 6 *Del. C.* § 2301(d) requires the addition of prejudgment interest to a final judgment, commencing from the date of injury.¹⁴ That statute applies only if, prior to trial, the plaintiff had made a written settlement demand, valid for a minimum of thirty days, in an amount less than the entered judgment.¹⁵ “The General Assembly enacted [§2301(d)] to promote earlier settlement of claims by encouraging parties to make fair

http://www.bls.gov/news.release/archives/cpi_04192006.pdf (Medical Care, March 2006 Unadjusted Index: 333.8) with Bureau of Labor Statistics, U.S. Dep't of Labor, http://www.bls.gov/news.release/archives/cpi_04142010.pdf (Medical Care, March 2010 Unadjusted Index: 387.142).

¹⁴ While an action by an insured against her automobile insurance carrier is normally considered a contract claim, *Allstate Ins. Co. v. Spinelli*, 443 A.2d 1286, 1287 (Del. 1982), the Delaware Supreme Court recently held that § 2301(d) applies to cases such as the one *sub judice*, *Rapposelli v. State Farm Mut. Auto. Ins. Co.*, 988 A.2d 425, 429 (Del. 2010).

¹⁵ 6 *Del. C.* § 2301(d). The parties agree that the plaintiff complied with the statute's demand requirement.

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offers sooner”¹⁶ Statutes like Delaware’s § 2301(d) are known as “rejected-settlement-offer statutes,”¹⁷ and a number of courts have held that, under such statutes, insurers are liable for prejudgment interest in excess of policy limits.¹⁸ This is so because the “award of prejudgment interest does not arise out of the action’s underlying controversy, and is not taxed to the defendant’s policy’s [] limit of liability as damages, but rather is an expense associated with the defense costs and strategy of the case.”¹⁹ A contrary holding would strip § 2301(d) of its purpose -- encouraging settlement -- when the insurer is faced with a case deserving the payment of the policy limit. I join these authorities and find that the plaintiff is entitled to prejudgment interest even though that pushes her total award past the policy limit.

9. While Delaware courts have not addressed this particular issue, the rule described above seems consistent with very recent Delaware case law. In the January 2010 case of *Rapposelli v. State Farm*, the Delaware Supreme Court held that the plaintiff in an under-insured motorist case was entitled to receive an award of prejudgment interest.²⁰ In that case, the court was faced with the issue of whether § 2301(d) applied to an insurance claim, which sounds in contract, despite the language

¹⁶ *Rapposelli*, 988 A.2d at 427.

¹⁷ 23 A.L.R. 5th 75.

¹⁸ See 23 A.L.R. 5th 75, §§ 7, 11(collecting cases).

¹⁹ *Cox v. Peerless Ins. Co.*, 774 F. Supp. 83, 86 (D. Conn. 1991) (internal quotations omitted).

²⁰ 988 A.2d 425.

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in § 2301(d) which, on its face, restricts prejudgment interest to successful tort claimants.²¹ The court held that the plaintiff in that case could seek prejudgment interest, and remanded the case to the trial court for an award of such. The plaintiff had been awarded a judgment of \$85,000, and his policy's limit was \$100,000. The time from injury to judgment was over four years. A calculation of prejudgment interest must necessarily have exceeded \$15,000, pushing the plaintiff's total award above the policy limit of \$100,000.²² Notably, the Delaware Supreme Court did not instruct the trial court to cap the interest award upon remand.²³

10. Finally, I conclude that the defendant's contention that the prejudgment interest is applied to the \$75,000 judgment amount is correct. Using \$75,000 to calculate the plaintiff's prejudgment interest follows both the letter and spirit of § 2301(d) because that is the maximum settlement amount the defendant would have considered in controversy, *i.e.* a settlement for the policy limit. The plaintiff, therefore, is awarded prejudgment interest of \$32,296.87, plus \$20.03 for every day

²¹ *Rapposelli*, 988 A.2d at 427. The particular language of 6 *Del. C.* § 2301(d) at issue in the *Rapposelli* case: "In any *tort* action for compensatory damages . . ." (emphasis added).

²² The plaintiff in *Rapposelli* was entitled to receive at least \$17,000 in prejudgment interest, regardless of the Federal Reserve discount rate at the time of injury ($\$85,000 \times .05 \times 4 = \$17,000$). See 6 *Del. C.* § 2301(a) (providing 5% as the baseline legal interest rate).

²³ See also 21 *Del. C.* § 2118(a)(1) (describing minimum insurance coverage as "[i]ndemnity from legal liability for bodily injury, death or property damage arising out of ownership, maintenance or use of the vehicle to the limit, *exclusive of interest and costs*, of at least the limits prescribed by the Financial Responsibility Law of this State.") (emphasis added).

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after February 26, 2010.²⁴

11. In conclusion, for the foregoing reasons, the plaintiff is awarded \$3,369 in costs (including expert fees), and prejudgment interest of \$32,296.87, plus \$20.03 for every day after February, 26, 2010.

IT IS SO ORDERED.

 /s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
File

²⁴ In their submissions to the Court, both parties agreed that - if prejudgment interest was calculated using \$75,000 as the correct award - \$32,296.87 (plus the \$20.03 per day) was the correct amount of prejudgment interest.